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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-688

LOWELL SCHOOL DISTRICT No. 71,

Petitioner.

v.

DOROTHY KERR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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This brief is filed pursuant to the Court's direction that a response be filed on or before February 8, 1978. Respondent believes that this case does not warrant this Court's plenary consideration, and that the petition for certiorari should be denied.

INTRODUCTION

Although the petition for certiorari states three "questions presented," a close analysis of the petition in light of the proceedings below makes clear that there are only two issues presented:

(1) Whether the Fourteenth Amendment creates a cause of action for monetary relief against a school district for violating a teacher's First Amendment rights, maintainable under 28 U.S.C. § 1331, irrespective of whether the school district is a "person" within the meaning of 42 U.S.C. § 1983.

(2) Whether Oregon school districts enjoy Eleventh Amendment immunity.[1]

As we show in Part I herein, this is neither the right case nor the right time for the Court to address the "Fourteenth Amendment cause of action" issue. (We also show in Part I that there is no reason to "hold" the petition on this issue pending decision in *Monell* v. *Department of Social Services*, No. 75-1914.)

In Part II, we show that the court of appeals' holding on the Eleventh Amendment issue conforms fully to this Court's decision in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), and does not merit this Court's attention.

ARGUMENT

I. The "Fourteenth Amendment Cause of Action" Issue

A. *The Court Should Not Grant Certiorari in This Case to Decide the Issue.*

This Court stated in *Mt. Healthy, supra*, that the question whether a cause of action exists under the Fourteenth Amendment which is not subject to the limitations of § 1983 is an "extremely important" one. 429 U.S. at 278. But the Court did not decide that question in *Mt. Healthy*, and

[1] The third issue stated in the petition is whether school districts are "persons" suable under § 1983. The district court held that they are not, and plaintiff did not appeal that ruling. Thus, the issue was not decided below and is not here.

neither should it do so here. As we show below: First, it is not clear whether either of the courts below considered or ruled on the issue. Second, now is not the appropriate time for this court to consider the issue: (a) the lower courts have only begun the process of unearthing and analyzing the wealth of materials that potentially bear on the issue's resolution; and (b) Congress presently is considering legislation which, if enacted, would render the issue of no practical significance. Third, the issue is brought here at an interlocutory stage of this case and may well be of no practical significance even to the parties herein.

1. *It Is Not Clear Whether Either of the Courts Below Considered or Ruled on the Issue.*

This action was brought against the School District as an entity, and against various school officials in both their official and individual capacities, alleging that plaintiff, a public school teacher, had been denied renewal of her employment contract because of her exercise of rights protected by the First Amendment. Plaintiff sought both equitable relief and damages against all defendants. Her complaint stated two causes of action against the School District: one under § 1983, with jurisdiction based on 28 U.S.C. § 1343, and the other directly under the Fourteenth Amendment—patterned after that directly under the Fourth Amendment which this Court recognized in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)—with jurisdiction based on 28 U.S.C. § 1331.

The district court dismissed the action against the School District prior to trial, holding that the School District is not a "person" suable under § 1983, and that the cause of action asserted against the School District directly under the Fourteenth Amendment could not be maintained because the School District enjoys the State's immunity under the Eleventh Amendment. Pet. App. B-1 to B-2. It is not clear from the district court's opinion whether it also adopt-

ed the School District's alternative argument that there is no *"Bivens"* cause of action under the Fourteenth Amendment against municipalities.[2]

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[2] The district court explained its dismissal of the action against the School District as follows (Pet. App. B-2):

> The action against the Lowell School District 71 must be dismissed. The school district is a municipal corporation and not a "person" under Section 1983 for purposes of either equitable relief or damages. *City of Kenosha* v. *Bruno*, ... U.S. ....., 37 L.ed.2d 109, 116 (1973); *Vanderzanden* v. *Lowell School District No. 71*, Civil No. 72-377 (D. Or. Sept. 5, 1973).
>
> Plaintiff also contends that the Court has jurisdiction under 28 U.S.C. § 1331 because her claim arises under the Constitution of the United States. The school district, however, is immune from suit under that statute. A state cannot be sued unless it expressly waives its Eleventh Amendment sovereign immunity. A school district is a political subdivision of the state. *Vendrell* v. *School District No. 26C, Malheur County*, 226 Or. 263, 360 P.2d 282 (1961). Plaintiff contends that the State of Oregon and defendant school district have waived their immunity. But ORS 30.320, the section which applies to this action, only waives the sovereign's immunity from suit in its own courts and does not waive the State's immunity under the Eleventh Amendment. *Waggoner* v. *Linn County School District No. 42*, Civil No. 73-251 (D. Or. Aug. 16, 1973); *DeLong Corp.* v. *Oregon State Highway Commission*, 233 F.Supp. 7 (D. Or. 1964).
>
> Plaintiff has failed to state a cause of action against the school district under 42 U.S.C. § 1983, 28 U.S.C. § 1343, or 28 U.S.C. § 1331.

The last-quoted paragraph of this opinion is ambiguous. It may simply be a summation of the court's prior holdings (in the case of the Fourteenth Amendment claim, that the Eleventh Amendment precluded it), or it may be a separate and independent adoption of the School District's alternative contention that there is no *"Bivens"* cause of action against municipalities under the Fourteenth Amendment. The Court of Appeals' opinion does not indicate what it understood the district court to have held.

The case proceeded to trial against the remaining defendants, but the district court granted the defendants' Rule 41(b) motion at the close of the plaintiffs' case, holding that plaintiff had introduced no evidence that the nonrenewal of her contract had been motivated by her activities protected by the First Amendment. Pet. App. B-6. The case was thus dismissed in its entirety. Pet. App. B-8.

Plaintiff appealed from both the pre-trial dismissal of her action against the School District and the Rule 41(b) disposition of her action against the remaining defendants. With respect to the first issue, plaintiff did not seek review of the district court's holding that the School District is not a "person" suable under § 1983, but only of the district court's dismissal of her alternative cause of action directly under the Fourteenth Amendment. In their brief to the court of appeals, defendants argued that the dismissal of this cause of action was proper because of the Eleventh Amendment bar, and also because there is no *"Bivens"* cause of action under the Fourteenth Amendment against municipalities.

The court of appeals reversed, and remanded for "further proceedings consistent with this opinion." The court found that plaintiff *had* introduced evidence of illegal motivation which precluded the granting of a Rule 41(b) motion. Pet. App. A-4 to A-5. And the court reversed the dismissal of the School District with the following analysis (Pet. App. A-3 to A-4):

> After the dismissal of School District from the action and after the order of the District Court directing a verdict in favor of all of the individual Defendants-Appellees, this Court in other cases made two rulings which are dispositive of this appeal. Those two rulings compel the reversal on this appeal of the order dismissing the action as to the Defendant-Appellee School District . . .
>
> Our Court in *Hutchison* v. *Lake Oswego School District No. 7*, 519 F.2d [961] (1975) (vacated on other

grounds) ..... U.S. ..... (1977), held that a money judgment for a past wrongful act could be imposed against an Oregon School District and that the Eleventh Amendment does not prohibit such money judgment. Our Court in so holding pointed out that such a judgment against an Oregon School District imposed no liability on the part of the State of Oregon to pay any part of such judgment for the reason that an Oregon School District has the power to sue and be sued and the power to tax and that the only obligation of the State of Oregon to an Oregon School District is the obligation to pay to the district an amount based upon the number of resident students and that such amount may not be an offset to the school district's own tax levy. In the case now before us we are concerned with an Oregon School District. Plaintiff-Appellant asserts her claim for recovery against School District under the Fourteenth Amendment for violation of her First Amendment rights, with jurisdiction under Title 28 U.S.C. § 1331, and in Title 42, U.S.C. § 1983. School District is not immune from such an action. *Mt. Healthy City School District Board of Education* v. *Doyle*, ... U.S. ..... (No. 75-1278, Jan. 11, 1977), part III of the opinion, pp. ..... to ..... (slip op., pp. 5-6). *Gray* v. *Union County Intermediate Education District*, 520 F.2d 803 (9th Cir. 1975). Under the doctrines of *Hutchison and Gray*, the trial judge erred in dismissing the action against School District.

It is by no means clear from the foregoing that the Court of Appeals actually considered or decided the "*Bivens*" issue;[3] certainly, the court's opinion contains no

[3] There is nothing on the face of the court's opinion indicating that it recognized the "*Bivens*" issue to be before it, let alone that it was deciding it. Nor do the cases cited in the opinion relate to the issue. *Hutchison* and Part III of *Mt. Healthy* relate only to the Eleventh Amendment. *Gray* relates only to the question of *jurisdiction* under § 1331, and as petitioner herein recognizes (Pet. 4): "The Court in *Gray* was apparently not asked to decide whether the complaint stated a claim for which relief could be granted against the school district." If the court *were* deciding the "*Bivens*" issue *sub silentio* it is difficult to believe it would have cited only Part III of *Mt. Healthy*, which discussed the Eleventh Amendment, and not Part II, which discussed the "*Bivens*" issue.

In arguing that the court of appeals *did* decide the *Bivens* issue, petitioner reasons as follows: the court of appeals declared that "the trial judge erred in dismissing the action against School District" (Pet. App. A-4), in the face of a brief urging affirmance on both the Eleventh Amendment and no-*Bivens*-cause-of-action grounds; therefore the court of appeals must have inferentially rejected the latter contention. That is a possible construction of the opinion below. But it is also possible that the court below understood the district court to have dismissed the action against the School District solely on the basis of the Eleventh Amendment, see note 2 *supra*, and that by reversing the Eleventh Amendment ruling and remanding for "further proceedings consistent with this opinion" (Pet. App. A-5) the court of appeals did not intend to resolve claims which had not yet been addressed by the district court.

analysis if it *was* deciding it. But even if the opinion could be construed as having resolved the issue in plaintiff's favor *sub silentio*, and even if this Court were willing to consider an "extremely important" legal issue in the absence of an articulated opinion by either lower court, there are several reasons why it should not do so here.

2. *Now Is Not the Appropriate Time for This Court To Consider the* "Bivens" *Issue.*

a. The "*Bivens*" issue, while straightforward in terms of practical effect, is one which this Court should not consider until the myriad materials that potentially bear on its resolution have been adequately unearthed and developed by the lower courts. Proper resolution of the issue depends upon sifting more than a century of legislative history and judicial developments, and that process has only recently begun in the lower courts. Each new lower court decision has uncovered additional historical evidence which bears on the issue, and each decision has furnished new insights

into the considerations which bear upon its resolution.[4] A definitive resolution by this Court at this time would pretermit this evolving process of scholarship and analysis at an early stage. On an issue as potentially important as whether the Fourteenth Amendment creates a cause of action against municipalities, this Court should not run the risk, which at this point might be substantial, of a decision that is inadequately informed. A further period of time in which lawyers in additional cases can research and brief the issue in the lower courts, and judges can assess the mountain of relevant historical materials that is being uncovered, will serve to sharpen and crystalize the issue, providing this Court an opportunity to decide this "extremely important question" (*Mt. Healthy*, 429 U.S. at 278) with greater assurance that it has before it all of the "evidence" pertinent to its resolution.

b. Moreover, it is possible that developments in the near future will render the *"Bivens"* issue less "important" than this Court perceived it to be in *Mt. Healthy*. As a practical matter, the issue is important only if there is no means to secure relief from municipalities under § 1983, whether in the form of an order against the municipality itself or against officials in their official capacities. If this

[4] A number of courts of appeals have held that there is a cause of action against municipalities directly under the Fourteenth Amendment on the authority of *Bivens*, without independent analysis. The only decisions to consider the arguably distinguishing factors present when a municipality is the defendant are *Brault* v. *Town of Milton*, 527 F.2d 730 (2d. Cir. 1975), vacated on other grounds, 527 F.2d 736 (2d Cir. 1975) (en banc); *Kostka* v. *Hogg*, 560 F.2d 37 (1st Cir. 1977); *Gagliardi* v. *Flint*, 564 F.2d 112, 117-126 (3rd Cir. 1977) (concurring opinion of Gibbons, J.); *Mahone* v. *Waddle*, 564 F.2d 1018, 1030-37 (3rd. Cir. 1977) (dictum); *id.* at 1037-62 (opinion of Garth, J., concurring in part and dissenting in part). Each of these decisions cites historical evidence and provides insights not contained in the decisions preceding it.

Court decides *Monell* in a manner which makes relief against municipalities available under § 1983, the question whether municipalities can also be sued directly under the Fourteenth Amendment will be one of no practical significance. And, regardless of how this Court decides *Monell*, Congress is presently considering whether to enact legislation which would amend § 1983 to expressly declare that all municipalities are "persons"[5]—with hearings scheduled in the Senate for the very week the instant brief is being filed.[6] Enactment of such legislation would leave the *"Bivens"* issue as one this Court would have no particular reason to consider. In the face of active legislative consideration of bills of this nature, it would seem the better course for this Court not to rush to consider the *"Bivens"* issue now.

3. *The Interlocutory Posture of This Case Makes It a Less Than Ideal Vehicle for This Court's Resolution of the* "Bivens" *Issue.*

This case must go back for trial in any event against the other defendants. (No petition has been filed seeking review of *that* ruling by the Court of Appeals.) The course of that trial will not be affected one bit by the presence or absence of the School District as an additional defendant. The School District has furnished its regular lawyer to represent the other defendants—indeed, even after the School District was dismissd by the district court before trial, its lawyer continued to represent the remaining defendants at the trial—so that the School District's presence as a defendant will impose no additional legal costs upon it. The evidence to be introduced upon remand will not vary one bit depending upon the presence or absence of the

[5] Bills to that effect are pending as S. 35; H.R. 4514.

[6] Before the Subcommittee on Citizen and Shareholder Rights and Interests of the Senate Judiciary Committee.

School District as a defendant. Thus the School District will be subjected to no additional expense if it is required to defend further without a definitive ruling from this Court. Most important, it is unlikely that the determination one way or the other of the *"Bivens"* issue, will affect the ultimate outcome of the case.[7] And, of course, if that unlikely event *should* occur, the School District would be able to seek review of the *Bivens* issue at that time.

In a case where the issue thus is likely to prove of little or no practical significance, it would be particularly unfair to have consideration of the issue by this Court further delay plaintiff's access to the remedies she seeks for the wrongs she has suffered. As there must be a trial in any event, plaintiff should be allowed to proceed to that trial and to obtain the remedies to which she would be entitled from the other defendants irrespective of the resolution of the *"Bivens"* issue. That issue can be considered later, in the unlikely event it becomes determinative of plaintiff's access to any of the relief awarded.

B. *The Court Should Not "Hold" the Petition Herein Pending Decision in* Monell

There is no reason for this Court to "hold" the petition herein pending decision in *Monell*, for however that case is decided there must inevitably be a trial of the instant case

[7] Plaintiff may lose on the merits. Plaintiff may win on the merits, and secure complete satisfaction of the judgment from the other defendants, rendering the issue moot. (This is the likeliest outcome, for it is common for school districts voluntarily to pay judgments entered against school officials. While we do not *know* that that would happen here, the fact that the School District continued to furnish counsel to the officials after it was dismissed from the case suggests that it would.) Only if satisfaction of the judgment ultimately depended upon collecting from the School District as an entity would the *"Bivens"* issue be significant in this case, and in that event the issue can be aired and decided at that time.

in the district court, and the lessons of *Monell*, if relevant, can be implemented below when it issues. If this Court rules in *Monell* that school districts are "persons" suable under § 1983, plaintiff will surely be able to reassert her § 1983 cause of action against the School District. And if this court holds to the contrary in *Monell*, plaintiff's rights against the School District will depend upon her *"Bivens"* cause of action, whose viability we have already shown should not be decided by the Court in this case at this time.

Plaintiff is understandably anxious to proceed to the trial to which she is indisputably entitled, and her path to securing the remedies due—whatever they may be—should not be lengthened by delays irrelevant to the ultimate disposition of this case.

II. The Eleventh Amendment Issue

The other issue which petitioner asks this Court to decide is whether Oregon school districts enjoy Eleventh Amendment immunity. That issue does not warrant this Court's attention. The Ninth Circuit had ruled, prior to *Mt. Healthy*, that Oregon school districts are not the "State" for Eleventh Amendment purposes, on an analysis which correctly anticipated the controlling standards announced by this Court in *Mt. Healthy. Hutchison* v. *Lake Oswego School District No. 7*, 519 F.2d 961 (1975), vacated on other grounds, 429 U.S. 1033 (1977). In the instant case, decided after *Mt. Healthy*, the Ninth Circuit reaffirmed its holding in *Hutchison*, citing *Mt. Healthy* as authority for its action. Pet. App. A-3 to A-4.

Petitioner offers nothing which would distinguish this case from *Mt. Healthy*. Its lone point is that the Oregon Supreme Court has ruled that Oregon school districts enjoy sovereign immunity as a matter of *state* law. But that was equally true of the Ohio school district involved in *Mt. Healthy*, and the petitioner there made precisely the same

argument (that the State's investiture of school districts with sovereign immunity controls the Eleventh Amendment question). See Brief for Petitioner in *Mt. Healthy*, pp. 26-31. Thus the decision below is entirely consistent with this Court's holding that Ohio school districts do not enjoy Eleventh Amendment immunity.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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